NO. 41865-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MICHAEL STEVEN THOMPSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00676-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

a. Summary 1

b. The rapes 2

c. Motion to continue 7

d. Trial testimony 8

C. ARGUMENT 13

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THOMPSON'S MOTION TO CONTINUE. 13

II. DEFENSE COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL. 16

a. Defense Counsel was prepared for trial 18

b. Counsel was not ineffective for choosing not to object to certain testimony. 20

III. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE. 30

IV. THOMPSON'S CASE SHOULD BE REMANDED SO THAT HIS JUDGMENT AND SENTENCE SHOULD BE AMENDED AND HIS CONVICTIONS ON COUNTS II AND IV VACATED. 31

D. CONCLUSION 33

TABLE OF AUTHORITIES

Cases

In re Pers. Restraint of Benn, 134 Wn.2d 868, 909, 952 P.2d 116 (1998) 18, 23, 27
State v. Barrow, 60 Wn.App. 869, 872, 809 P.2d 209 (1991) 24
State v. Bebb, 44 Wn.App. 803, 816, 723 P.2d 512 (1986) *aff'd on other grounds*, 108 Wn.2d 515, 740 P.2d 829 (1987) 25
State v. Boehning, 111 P.3d 899 (2005) 23
State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990) 17
State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) 16
State v. Contreras, 57 Wn.App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990) 24
State v. Corbett, 158 Wn.App. 576, 597, 242 P.3d 52 (2010) 24
State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) 17
State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967) 27
State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006) 24
State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) 16
State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983) 17
State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 26, 27
State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989) 17
State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995) 16
State v. Price, 127 Wn.App. 193, 203, 110 P.3d 1171 (2005) 18, 23, 27
State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) 23
State v. Suarez-Bravo, 72 Wn.App. 359, 864 P.2d 426 (1994) 23
State v. Trombley, 132 Wash. 514, 518, 232 P. 326 (1925) 27
State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (Aug. 2010) 32
State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007) 32
Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 16, 17, 19

Statutes

RCW 10.46.085 14
RCW 9.68 14
RCW 9.68A 14
RCW 9A.44 14
RCW 9A.64.020 14

Rules

FR 609 (d) 9
RAP 2.5 (a) 26

A. RESPONSE TO ASSIGNMENTS OF ERROR[1]

B. STATEMENT OF THE CASE

a. *Summary*

Michael Thompson raped two classmates. The first girl he raped, A.M., a freshman in high school, came over to his house to watch a movie and he vaginally raped her while pinning her down by her arms and legs. The second girl he raped, C.M., a sophomore in high school, agreed to hang out with him in the auditorium of Mountain View High School as they ate lunch. He took her into a secluded area and forced himself on her, groping her breasts and sticking his hand down her pants and digitally raping her as she told him "no" and begged him to stop. C.M. reported her rape the same day it happened. A.M. didn't report her rape for several months because she was scared.

Thompson was charged by amended information with one count each of rape in the second degree and rape in the third degree as to C.M.,

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[1] Rather than organize his brief in an easy to follow structure, Thompson makes five assignments of error and places them in a particular order. Then, in his "Issues Pertaining to Assignments of Error," he switches the order around and he includes an issue that is not presented by his assignments of error, to wit, that cumulative error deprived him of a fair trial. He also fails to mention assignment of error C ("judicial comment on the evidence") in his "Issues Pertaining to Assignments of Error." Then, in the body of his brief, he argues four assignments of error, reintroducing the "judicial comment" claim and rolling the cumulative error claim into his ineffective assistance of counsel claim. Respondent organized its response by the order of assignments as they appeared in the body of the brief.

and one count each of rape in the second degree and rape in the third degree as to A.M. CP 14-15. He was found guilty of all counts. CP 35-38. Although all four crimes are listed on the judgment and sentence, Mr. Thompson was only sentenced for counts I and III (the rape second degree counts). CP 43-46. As to the sentence for counts II and IV, the court wrote "merged" on the line where the sentence would ordinarily have been written. CP 46. This timely appeal followed. CP 65.

b. *The rapes*

C.M. and the defendant, Michael Thompson knew each other as students at Mountain View High School. RP 203. C.M. was a sophomore. RP 247. They had been casually romantically involved prior to March 4, 2010. RP 219, 248. They had kissed on a few prior occasions and he had fondled her breasts and buttocks. RP 248. On one occasion, he digitally penetrated her. RP 258. All of those acts had been done with her consent. RP 248, 258.

On March 4, 2010 the defendant asked to "hang out" with C.M. during lunch. RP 203. He walked up to her in the cafeteria to ask if they were going to hang out and she said "Yeah," and followed him to the auditorium carrying her lunch and her school stuff. RP 204. In the auditorium he asked if she was dating anyone and she told him "no." RP 204. While in the auditorium she strolled, did cartwheels and ate her pizza.

RP 205. At some point they moved to a different part of the auditorium and the defendant hugged C.M. RP 205-07. C.M. was standing up against a wall and the defendant began to kiss her. RP 209. Initially she kissed him back, but then he began to pull down the straps to her tank tops and bra and she said "Stop, no." RP 209. The defendant ignored her as she tried pushing him away, and he succeeded in exposing her breasts. RP 209. He began fondling them with both his hands and his mouth. RP 210. During the entire time this was going on C.M. was saying "Stop," and trying to push him away from her. RP 210. He said "Sorry, I'm not listening." RP 210. She managed to get covered up after some period of time. RP 210. He also reached around her and tried putting his hands down the back of her pants and she told him "No, stop," and tried to push him away. RP 211.

At one point another student walked in on them after she had re-covered her breasts and, misinterpreting the situation, giggled and said "Oh, sorry" and ran back out. RP 212. They began to leave and C.M. began forging a path back to the cafeteria. RP 213. However, she realized she didn't have her school stuff and turned around to retrieve it. RP 214. The defendant said "I'm sorry again for not listening" and moved in to give her another hug. She didn't want to hug him so she "kind of patted him on the back." RP 214. Then, the defendant somehow turned her

around and put his hand down the front part of her jeans. RP 214. She couldn't get his hand out so she dropped to her knees in an effort to get it out but it didn't work. RP 214. C.M. somehow landed on her back, figuring she must have lost her balance. RP 214. He still had his hand in her pants and remarked that it would be a lot easier if her belt were off. RP 214-15. She said "That's why it's not coming off," and continued to tell him "No, stop" very clearly. RP 215. He managed to get his hand into her underwear and she grabbed his wrist trying to pull it out. RP 215. His shoulder was against her, too. RP 215. He put his finger inside her vagina. RP 216. She kept saying "Stop," and "Get off me," and he said "If I stop, what do I get?" She said "Nothing. Now just stop." RP 215. Eventually he stopped and got off her and she got up. RP 215. He let her leave the auditorium and after leaving she sought out a friend named Kyle. RP 217.

Kyle said that when C.M approached him she "wasn't herself. She's usually vocal and hyper. She was more quiet." RP 63. She pulled him aside and asked him "If a girl told [him] "no" if he were doing something would [he] still keep going?" Kyle told her "no," he wouldn't. RP 63. She then disclosed the rape to Kyle in general terms, and he "got the gist of what she was heading towards saying." Id

When C.M. came home from school that day her step-mother noticed that she was very quiet and went straight to her room. RP 69.

When asked what was wrong C.M. got teary-eyed and told her step-mother she didn't want to talk about it. RP 69. Later that night, after much reluctance and prodding, C.M. disclosed the rape to her step-mother as well. RP 71.

Another student at Mountain View High School, A.M. knew the defendant as well. RP 156. She was a freshman and he was older. RP 156. They were friends. RP 156. A.M. has been to the defendant's house twice. RP 157. The first time was when she went to help him with his homework. RP 157. The defendant's dad and brother were both there, and his dad drove her home after they were done. RP 157. The defendant and A.M. had exchanged a kiss once after school. RP 158. A.M. described it this way: "All we did was kiss, and then—because he was taking me home, and I didn't know what to do. So I got out of the car and went in my house, so..." RP 158. Then, at some point prior to Christmas in 2009, the defendant invited A.M. over to his house to watch a movie or play the Wii. RP 159-60. When she got there the defendant told her no one else was home and he turned on the movie Transformers. RP 160. They initially were sitting on different couches but at some point the defendant turned off the movie and came over to her couch. RP 164-66. A.M. couldn't remember how much of the movie had played because

"everything happened so fast," but she thought it was toward the beginning. RP 166.

When the defendant came over to her couch he started kissing and touching her and trying to pull her pants down. RP 166. He began by kissing her on the lips and then he started biting her. RP 166. He pulled her to the ground and she was trying to get him off her. RP 166. She repeatedly said "No" and told him "Stop." RP 166. He was using his hands to get her pants down by unbuttoning the button and unzipping them. RP 166. He pinned her down and took her pants off all the way, and then he held both of her hands with one of his over her head. RP 167. He pinned her legs down with his own and pulled down his pants. RP 167. Then he vaginally raped her. RP 167. She tried to push him off her but she wasn't strong enough. RP 167. She thought the rape lasted five or ten minutes. RP 167. He said he "was done" and got off of her, and she wanted to walk home. RP 168. He insisted on driving her home. RP 168.

A.M. did not report the rape for several months because she was scared. RP 168, 170. Eventually she told her boyfriend who subsequently revealed her secret by his actions in threatening to beat up the defendant and getting expelled from school as a result. RP 170, 288.

c. *Motion to continue*

On January 20, 2011, three days before trial, defense counsel moved to continue the trial. RP 1-20-11 (before Judge Bennett). The first reason counsel offered was that there was a witness who the first victim, C.M., mistakenly believed had also been raped by the defendant. Id. at pgs. 6-8, 10-11. This person was contacted by a police officer and said that in fact she had not been raped by the defendant. Id. at p. 8. Defense counsel wanted to call this witness so she could testify that the defendant did not rape her and C.M. was wrong. Id. at 7-8. The State noted that defense counsel received contact information for this witness on December 9, 2010, some six weeks before trial. Id. at 8. The defense agreed that this witness only pertained to counsel's readiness as to the first victim, not the second. Id. at 6-7. The court asked how this was not impeachment on a collateral matter? Id. at 9-10. Defense counsel had no answer to that question, and simply said that he thought he should be able to interview her. Id. at 10. The trial court ruled that this particular basis for the motion was denied because "I see impeachment on a collateral matter here, and it does not appear to me admissible nor helpful to the defense, obviously if it isn't admissible." Id. at 11

The second person defense counsel wanted to interview also pertained only to the charges involving C.M. He wanted to contact an

alleged former boyfriend of C.M. who, according to defense counsel, had been caught having sex with C.M. by C.M.'s father.[2] RP 11-13. This information was relevant, defense counsel claimed, because it would show that C.M. was an angry person. Id. at 12.

The third person defense counsel wanted a continuance so that he could interview was Stephanie Hollada. RP at 14. Defense counsel had her contact information and there was an investigator working on Thompson's behalf. RP 14-16. The trial court told defense counsel to have his investigator "get right on it." RP 16.

The trial court denied the motion to continue, saying that defense counsel had not made a sufficient showing to warrant a continuance. RP 16-17. Stephanie Hollada ultimately testified at trial. RP 431.

d. *Trial testimony*

Roman Enlund is A.M.'s former boyfriend. RP 281-82. He was also friends with the defendant. RP 282. When A.M. disclosed to Mr. Enlund that the defendant raped her he became very upset. RP 283. At school he attempted to fight the defendant but was thwarted by other students. RP 285-86. He tried again later in the day by approaching the

[2] Defense counsel, it should be noted, offered no evidence to support this specious claim that C.M. had been caught having sex by her father. Counsel simply said "he was mentioned in the reports" and confirmed that he had no idea what this hypothetical person would say. He confirmed he had "no idea" what this person had to add to the case. He did not answer the trial court's direct question about where he got this information. RP 11-13.

defendant in the hallway but was again thwarted by a teacher. RP 286-87. The teacher, Mr. Buswell took both boys into the P.E. room and began questioning them. RP 287. During this conversation Roman asked the defendant if he "had done it," and the defendant looked down at the floor and said "Yeah," or something to that effect. RP 287. Roman tried to assault the defendant but Mr. Buswell stopped him. RP 287. He was subsequently expelled from school as a result. RP 288.

During cross-examination of Roman defense counsel, outside the presence of the jury, asked the court's permission to question Roman about his convictions for residential burglary (two different convictions), theft 3 (two different convictions), theft 2 and vehicle prowl (three different convictions). RP 297-98. All of these convictions occurred when Roman was a juvenile. RP 298-99.

The court noted that ER 609 (d) provides:

> (d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

RP 299. The court asked defense counsel why he should exercise his discretion under ER 609 (d) and defense counsel withdrew his request.

saying he felt he should bring it up but that "I'm not going to push for it real hard, Your Honor." RP 299.

Irene Sheppard is a registered nurse at Southwest Washington Medical Center. RP 115. She is a sexual assault nurse examiner.[3] RP 116. She testified that she might do a rape kit as a result of digital rape, but only if the victim had not showered or done things related to hygiene. RP 120. On March 5, 2010, the day after the rape, C.M. came to Southwest Medical Center for a rape examination. RP 123. Ms. Sheppard testified that C.M. gave her the following account of the rape:

> She told me about being at school. And she related that she was at school the day before, that she had been approached by a young man, an older student. I believe she was a ninth or tenth grader, and this was someone who was much older, I think a senior, that approached her in the dark of the auditorium area of the school; and that he forced himself on her; was what I deem as sort of cheeky or sort of hitting on her a bit by asking her if she had a boyfriend, if she was dating, things like that; and that he forced himself on her in terms of trying to kiss her. She said he pulled her shirt down and handled her breasts, licked her breasts, bit her breasts or sucked on them. There was a little bit more detail, and that she somehow or other either fell over or he pushed her over onto the ground and groped her in her jeans, attempting digital penetration of her vagina...She said that he penetrated her briefly with his finger.

RP 126. Ms. Sheppard testified that C.M. told her she had resisted the defendant. RP 127.

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[3] The acronym used by Ms. Sheppard was SART, which stands for sexual assault rape trauma examiner.

The prosecutor asked Ms. Sheppard how C.M.'s demeanor was during the exam. RP 127. Sheppard testified:

> She was fairly calm. I was rather impressed that she seemed—she was very well dressed as far as—she—for a teenager of her age. I was pleased that she seemed very—well, she presented herself very well and that she seemed to be a reasonable young woman. And quickly she started shaking, started crying, obviously was quite traumatized, seemed really unsure of why this would have happened to her, and confused about why this happened. She did declare that she didn't feel like it was warranted, that—basically, that she didn't hit—return his attention and that she wasn't seeking him out, so to speak. And she was able to calm herself for very few moments, and then she really was crying quite a bit, just really shaking.

RP 127.

Later, the prosecutor asked Ms. Sheppard about the actual perineal exam itself: "And I believe you mentioned something to me about a frog squat? What is that?" RP 128. Sheppard testified:

> Instead of using the stirrups on her because she was so very upset, it is somewhat more comfortable for a young girl, especially if she's not very experienced in the ways of the world and things like that that it's easier to just bring them up—and I do this a lot with the pediatric cases where they actually lay down with—on their back with their knees dropped open and their little feet up a little bit. It's a little bit more of a secure positioning for them, especially if they're really traumatized. And she was.

RP 129. Defense counsel did not object to any of this testimony.

The bra C.M. was wearing at the time of the rape was the same bra she was wearing when she presented for the exam at the hospital. RP 133.

It was secured as evidence in a paper evidence bag and given to Officer Schaffer of the Vancouver Police Department. RP 133. This information was contained in Ms. Sheppard's report; defense counsel possessed a copy of this report. RP 131, 133.

John Visser was hired as the defendant's investigator and began working on this case on behalf of the defendant on June 10, 2010. RP 340. Visser testified that he attended the law enforcement academy in 1991 and went to work for the Clark County Sheriff's Office. RP 341. He said he received over a thousand hours of training his first year with CCSO another two thousand hours of training before he "left law enforcement." RP 341. Asked what kind of work he did as a policeman, he testified he worked patrol for seven years and then worked in "major crimes on a serial rape task force for two and half years." RP 341. He also said he worked as a narcotics detective for three years and spent his final year on patrol. Id. Later, he reiterated to the jury that he was on a serial rape task force and was "a lead detective on a high profile serial rape case here in Clark County." RP 369.

Prior to his testimony the State sought permission to impeach Visser with the fact that he had been fired from the Clark County Sheriff's Office for misuse of county property. RP 266. Specifically, he was at a juvenile drinking party while off duty and allowed juveniles to drink

alcohol, and used his patrol car and lights to dissuade other juveniles from arriving at the party. RP 266. He was fired on December 15th, 2005. RP 267. The State argued that this evidence bore upon his honesty and his bias toward the State. RP 266, 275. The State argued that the transgression for which he was fired involved deception, to wit: That he represented that he was on duty and there was official business being conducted. RP 275. The court ruled that Visser's misuse of county property went to his "morality" but not his honesty, and that his acts did not involve deception. RP 275. The court excluded the evidence. RP 276.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THOMPSON'S MOTION TO CONTINUE.

On January 20, 2011, defense counsel moved to continue the trial date. The reasons he gave, to the extent they can be discerned at all, were as follows: That there were witnesses he still wanted to interview who may or may not have information tending to paint C.M. in a bad light. Witnesses for whom he offered no excuse as to why he had failed to contact them until three days before trial. When pressed, he could not offer any argument as to how the information he sought to obtain from these witnesses was either relevant or admissible. Defense counsel had an investigator working for him so it was not as though the burden for

contacting witnesses fell entirely, if at all, on his shoulders. At least one of the witnesses he named, Stephanie Hollada, testified at trial on behalf of the defendant.

Notably, the amendment of the information adding the counts pertaining to A.M. played no role in Thompson's motion to continue. He did not allege that the addition of these charges prevented him from being prepared, and indeed such a suggestion would have been specious given that 83 days passed between the addition of the charges pertaining to A.M. and trial (See Brief of Appellant at p. 9.

Even minimal experience reading verbatim reports of proceedings will teach you that some judges grant continuances more liberally than others, with a lower degree of concern over the reason(s). Retired Judge Bennett is not one of those judges. He requires that the reasons for a continuance be clearly stated and clearly support the need to continue the trial. Further, RCW 10.46.085 instructs trial courts that continuances are generally prohibited in certain cases:

> When a defendant is charged with a crime which constitutes a violation of RCW 9A.64.020 or chapter 9.68, 9.68A, or 9A.44 RCW, and the alleged victim of the crime is a person under the age of eighteen years, neither the defendant nor the prosecuting attorney may agree to extend the originally scheduled trial date unless the court within its discretion finds that there are substantial and compelling reasons for a continuance of the trial date and that the benefit of the postponement outweighs the detriment to the

> victim. The court may consider the testimony of lay witnesses and of expert witnesses, if available, regarding the impact of the continuance on the victim.

Here, Mr. Marlton could give no coherent reason why he needed a continuance. He couldn't articulate what information he still sought to collect and couldn't articulate what information he believed he would learn through further interviews. Likewise, Thompson offers no reason in this appeal why this Court should conclude the trial court abused its discretion, beyond his apparent suggestion that anytime a continuance is sought where the defense counsel elicits the magic words ("I can't be effective because I'm not ready"), the continuance must be granted. The trial court observed that motions to continue must be carefully scrutinized because they could be a strategic attempt to insert error for appeal. Appellate counsel suggests the Thanksgiving and Christmas holidays had made it difficult for defense counsel to "locate students at school," however defense counsel himself did not proffer this as a reason why he wanted a continuance. Moreover, defense counsel presented numerous witnesses at trial and he presented an aggressive defense. The trial court did not abuse its discretion and Thompson's right to a fair trial was not impaired by the trial court's refusal to grant the continuance.

II. DEFENSE COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics.' " *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable

effect on the outcome." *Strickland* at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Where a defendant alleges ineffective assistance of counsel for counsel's failure to object, he must show that the objection would have been sustained and that the trial's outcome would have been different. *In*

re Pers. Restraint of Benn, 134 Wn.2d 868, 909, 952 P.2d 116 (1998); *State v. Price*, 127 Wn.App. 193, 203, 110 P.3d 1171 (2005).

a. *Defense Counsel was prepared for trial*

Thompson draws several things from the record that he claims demonstrates a lack of preparedness for trial on the part of defense counsel. The first example is counsel's statement at the motion to continue that he was unprepared for trial. To the extent this motion may have been a delay tactic because delay, in practice if not in theory, invariably works to the benefit of the criminal defendant, this statement could have been self-serving. Even if this motion was not brought for delay, the court's extensive colloquy with defense counsel demonstrated that he was, in fact, prepared for trial. That counsel wanted to interview any number of people who bore no relevant or admissible information did not demonstrate unpreparedness for trial. Counsel was not unprepared for trial.

The second example Thompson believes supports his claim that counsel was unprepared was his decision to abandon impeachment of Roman Enlund by prior convictions. Although Thompson urges an interpretation of the record that suggests his attorney withdrew his request to impeach Mr. Enlund because he was unaware of what the prior convictions were, the record belies this claim. Counsel knew what the convictions were and listed them in detail for the court. The record reflects

that defense counsel abandoned his request to use them against Mr. Enlund when the trial court insisted he establish that this evidence was necessary for a fair determination on the issue of innocence or guilt. The record demonstrates his decision was strategic. Counsel noted that he felt he should at least bring it up, but that he wasn't pushing very hard for admission of this evidence. This was a legitimate tactical decision, permissible under *Strickland*, supra.

When the person to be impeached is the criminal defendant, the inherent nature of a defendant's motive to lie to avoid conviction is so compelling that the there would scarcely ever be a reason not to proceed with impeachment by prior conviction. However, in the case of a fact witness who has no motive to lie (Enlund is A.M.'s ex-boyfriend, not her current boyfriend), and nothing to either gain or lose by testifying, attacking him with prior convictions has the potential to appear as an ad hominem attack. An ad hominem attack, which attacks the character of a person rather than answer his claim, is of questionable persuasive value and tends to engender more scorn for the attacker than the recipient of the attack. Defense counsel likely considered this, as any reasonable attorney would. Defense counsel had already effectively examined Mr. Enlund and the jury learned that he is not always well-behaved. Further impeachment of his character with an ad hominem attack could have been overkill, and

given the jury the impression that the defendant gravely feared his testimony. Thompson received effective assistance of counsel.

The last example of counsel's supposed unpreparedness was when counsel stated he didn't know where C.M.'s bra was. See RP at 374. This did not render counsel ineffective. Counsel knew the bra had been collected by the State, as evidenced by his cross-examination of Ms. Sheppard, the SART nurse (see RP at 133). Even if counsel didn't know the exact location of the bra, such information was not germane to his trial strategy. His strategy was to impugn the State for not having the bra tested for saliva, not to have the bra tested himself. This is a common, proper and highly effective defense tactic: To suggest there is a lack of evidence that gives rise to a reasonable doubt. Whether counsel knew the exact location of the bra bore no relevance to his effectiveness at trial (it is worth noting that counsel's claim that he didn't know where the bra was located was *not* mentioned in front of the jury.) Counsel was not unprepared for trial and rendered effective assistance at trial.

b. *Counsel was not ineffective for choosing not to object to certain testimony*

Thompson claims that his counsel was ineffective for failing to object to certain pieces of testimony. They are discussed in turn below.

1. Testing of the bra

Thompson argues that the prosecutor committed misconduct during the cross examination of defense investigator John Visser. Although not required to do so, Thompson presented a defense. One of the key components of this defense was to suggest that the State's failure to submit C.M.'s bra for DNA testing gave rise to a reasonable doubt. Moreover, capitalizing on the court's decision to shield the jury from knowing that John Visser was fired from the Clark County Sheriff's Office for misuse of county property, Thompson presented him as a former police detective with extensive and unimpeachable investigative experience in the area of sexual assault. Indeed, Visser made much of his work on a serial rape task force before he was fired from the department. He testified extensively about the "investigation" (defense counsel's word, not the State's—see RP at 391) he did in this case. He testified that C.M.'s bra could have been submitted for DNA testing but wasn't. RP 391.

Specifically, the prosecutor asked Visser whether he had received the police and medical reports in this case and he confirmed that he had. RP 406-07. The prosecutor then asked whether, then, he was aware that C.M.'s bra had been collected and he bizarrely answered "That's entirely not true." RP 407. The prosecutor asked "You didn't know that it had been collected at the hospital?" Visser immediately retreated and confirmed that

yes, he learned from defense counsel that the bra had been collected at the hospital. RP 407. Visser tried to minimize this gap in his "investigation" by claiming that he wasn't told this information until December (2010), but he was forced to re-confirm that he possessed the hospital report from the moment he took on the case. RP 407. The prosecutor asked him "And is it a fair statement that you were conducting an investigation in this case?" RP 408. Despite having answered this same question in the affirmative when it was asked by defense counsel on direct, he became defensive and wanted the prosecutor to "define" investigation. RP 408. Then he said ""I do what the defense asks me to do, nothing more." Id. At this point the prosecutor asked "Would it have been possible for you to submit the bra for DNA testing?" Visser said "no." She then asked "Would it have been possible for you to have asked for the bra to be submitted for testing?" He answered, "I could have inquired, if I would've been asked by the defense to do that." RP 408. He offered "I didn't know about that. I wasn't asked to do that. No." RP 409. Defense counsel did not object.

The latter two questions are presumably the ones Thompson complains of in his brief. Although he claims that the prosecutor asked "why" the defense did not submit the bra for testing (see Brief at 14), the prosecutor actually asked no such thing. She merely asked whether he

(Visser) could have either submitted the bra for testing or asked that it be submitted. Given Visser's years as a rape investigator (experience that he proffered to the jury to bolster his credibility), this question was hardly out of left field. If Visser didn't know whether or how to initiate testing of this piece of evidence, who would? Visser's evasive answers to these questions served to damage his credibility, not shift the burden of proof.

It must first be observed that Thompson has chosen to present this claim of error as one of ineffective assistance of counsel rather than prosecutorial misconduct. To obtain reversal based on prosecutorial misconduct that was not objected to at trial, the appellant must demonstrate that the prosecutorial misconduct was so flagrant and ill-intentioned that it could not have been remedied by a curative instruction. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994).

Thompson evidently feels that the prosecutor's question was not flagrant and ill-intentioned, so he has chosen to argue simply that counsel was ineffective for failing to object. As noted above, in order to demonstrate ineffective assistance of counsel he must demonstrate both that an objection to this question would have been sustained and that the absence of this testimony would have produced a different verdict. See *Benn* and *Price*, supra. He has failed in his burden.

Thompson claims the prosecutor's question shifted the burden of proof to the defendant but he offers no analysis to support his claim. He offers one sentence in support of his claim: "Arguments by the prosecution that shift the burden of proof onto the defense constitute misconduct. See *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006)." Brief of Appellant at 12. Although he cites one case, this is the sole comment he makes on this claim of error. This Court should not consider assertions which are not supported by adequate argument and citation to authority. *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010) ("We do not review assigned errors where arguments for them are not adequately developed in the brief.")

On shifting the burden of proof, the Court of Appeals has observed:

> When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.

State v. Barrow, 60 Wn.App. 869, 872, 809 P.2d 209 (1991); citing *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990). In *State v. Bebb*, 44 Wn.App. 803, 816, 723 P.2d 512

(1986) *aff'd on other grounds*, 108 Wn.2d 515, 740 P.2d 829 (1987) the Court of Appeals stated "A prosecutor can comment on the accused's failure to present evidence on a particular issue if persons other than the accused or his spouse could have testified for him on that issue."

The prosecutor's questions did not shift the burden of proof. They were fair questions designed to chip away at the rosy impression Visser had given the jury about his investigative prowess and his law enforcement experience. If Visser was as good a rape detective as he claimed, it is unimaginable that he wouldn't know how, as a defense investigator, he could request forensic testing of a piece of evidence in a sexual assault. Was the jury really to be left with the impression that such requests by defense investigators are in any way unusual? The prosecutor did not shift the burden of proof. Rather, she conducted a fair cross-examination designed to impeach Visser's credibility. There was no error and counsel was not ineffective for failing to object to these questions, questions that he himself invited during direct examination.

2. Alleged opinion on credibility

In order to demonstrate ineffective assistance of counsel, Thompson must first demonstrate that the testimony complained of was an improper comment on the credibility of a witness. Thompson claims that

SART nurse Sheppard rendered an opinion on C.M.'s credibility, and that counsel was ineffective for failing to object. This is incorrect. In order to support his claim, Thompson takes several portions of Sheppard's testimony and strips them of their context. The first so-called "opinion" that Thompson complains of is when Sheppard said "...was what I deem as sort of a cheeky or sort of hitting on a bit by asking her if she had a boyfriend..." RP 126. Thompson's reading of this testimony misrepresents what was actually said. The full excerpt appears above in the statement of the case, under the section titled "trial testimomy." Ms. Sheppard was asked what C.M. told her about the sexual assault and she answered the question. It is clear from the context of her answer that she was relaying that this was what C.M. *told her*, although she couldn't give a word for word account. Counsel did not object to this testimony because this testimony was not objectionable.

Although discussed under the rubric of "manifest constitutional error" under RAP 2.5 (a), the Supreme Court observed in *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007):

> "Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

> Requiring an explicit or almost explicit statement by a witness is also consistent with this court's precedent that it is improper for any witness to express a personal opinion on the defendant's guilt. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Trombley*, 132 Wash. 514, 518, 232 P. 326 (1925).

Kirkman at 936-37 (some internal citations omitted.) Sheppard's testimony did not even come close to an explicit or almost explicit statement that she believed C.M.

Where the appellant cannot demonstrate both that the objection would have been sustained and that the outcome of the trial would have been different absent the objectionable testimony, no claim for ineffective assistance can lie. See *Benn* and *Price*, supra.

The second claimed instance of Sheppard commenting on C.M.'s credibility supposedly occurred where she said "Instead of using the stirrups on her because she was so very upset, it is somewhat more comfortable for a young girl, especially if she's not very experienced in the ways of the world and things like that." (RP 128). Again, this testimony was stripped of its context by Thompson. Sheppard was responding to the prosecutor's question about an exam position called "frog squat":

"And I believe you mentioned something to me about a frog squat? What is that?" RP 128. Sheppard answered:

> Instead of using the stirrups on her because she was so very upset, it is somewhat more comfortable for a young girl, especially if she's not very experienced in the ways of the world and things like that that it's easier to just bring them up--and I do this a lot with the pediatric cases where they actually lay down with--on their back with their knees dropped open and their little feet up a little bit. It's a little bit more of a secure positioning for them, especially if they're really traumatized. And she was.

RP 129.

Thompson complains that this testimony bolstered the credibility of C.M. and engendered sympathy for her.

First, Sheppard had already testified that C.M. was extremely upset and testifying that she was "so very upset" was not materially different from her earlier testimony. Counsel was not ineffective for failing to object to this non-objectionable testimony. Second, in the portion of her testimony where Sheppard says "especially if she's not very experienced in the ways of the world" Sheppard was referring to girls in general in which she would use a frog squat position rather than stirrups, not necessarily C.M. She did not directly say that C.M. was a girl who is not very experienced in "the ways of the world." And even if she had, how does that bolster C.M.'s credibility? Whether C.M. is inexperienced sexually has nothing to do with her veracity. Indeed, C.M. forthrightly admitted that she had allowed the defendant on prior occasions to grope her breasts and, on at least one occasion, insert his finger into her vagina.

C.M. made no attempt to paint herself as wholly inexperienced sexually. This case was not about whether C.M. was promiscuous, it was about whether, on this occasion, C.M. *withheld* her consent and the defendant nevertheless ignored her and forced himself on her. The defendant's theory of the case was that the defendant rebuffed C.M.'s advances and she made up this story to get back at him. Such a theory does not rise or fall on C.M.'s level of sexual experience or her sexual "innocence." This was not a comment on C.M.'s veracity and counsel was not ineffective for choosing not to object to this non-objectionable testimony. Sheppard did not make an explicit or almost explicit statement that she believed C.M. There is simply nothing about this testimony that speaks to C.M.'s believability. Moreover, Thompson makes no attempt in this appeal to demonstrate that the outcome of this trial would have been different absent this testimony.

The final claimed instance of Sheppard commenting on C.M.'s credibility supposedly occurred where Sheppard said this: "I was pleased that she seemed to be a very reasonable young woman." See RP 127. Again, Thompson strips this comment of its context to suit his claim. Sheppard was asked about C.M.'s demeanor during the exam. Sheppard was explaining that when C.M. first arrived she appeared very well, was "reasonable," which is to say calm and appropriate, and that she became

extremely upset when the exam began. She began shaking and crying and came off as very traumatized. Sheppard's answer attempted to illustrate this contrast for the jury and provide the full picture of C.M.'s demeanor. In other words, it was an honest and comprehensive answer to counsel's question. Observing that C.M. was calm, reasonable and well dressed was not a comment on her veracity. Again, this was not a statement about C.M.'s believability. An objection to this testimony would not have been sustained, nor would the absence of this testimony have produced a different verdict.

Because Thompson has not demonstrated ineffective assistance of counsel, it follows that cumulative error (or cumulative ineffectiveness, as it were) did not deprive Thompson of a fair trial. Thompson received effective assistance of counsel.

III. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE.

Mr. Thompson adequately explains the law on judicial comments on the evidence in his brief and Respondent accepts that recitation of the law.

During Ms. Sheppard's direct testimony, she made this improper remark: "It was her physical and her emotional appearance and just the details of the actual victimization that struck me as being very, very

credible." RP 130. Defense counsel immediately objected and the court sustained the objection and immediately gave a curative instruction to the jury, telling them "Ladies and gentlemen, witnesses cannot comment on the credibility of other people. Disregard that statement." RP 130. A person in Sheppard's position should have known better than to make such an obviously improper comment and she was clearly embarrassed by it, as she should have been. She said "excuse me, I know better" in an effort to apologize to the court for her lack of respect in making such a comment. RP 130. The court replied "It's all right." RP 130. The court was clearly accepting her apology. He could have said "apology accepted," but he chose the verbiage "It's all right."

To suggest, as Thompson does, that the court was endorsing her remark is, with due respect, ridiculous. If he was endorsing her remark he would have overruled Thompson's objection and he certainly would not have given a curative instruction. No reasonable person could read the record that way. The trial court did not comment on the evidence.

IV. THOMPSON'S CASE SHOULD BE REMANDED SO THAT HIS JUDGMENT AND SENTENCE SHOULD BE AMENDED AND HIS CONVICTIONS ON COUNTS II AND IV VACATED.

Thompson was not sentenced on all four counts, as he erroneously claims in his brief. However, his convictions for counts II and IV have not been vacated, meaning they still exist. Assuming this Court affirms

Thompson's convictions on counts I and III, the State respectfully concedes that his case must be remanded to the Superior Court for vacation of his convictions on counts II and IV and amendment of his judgment and sentence to reflect the dismissal of counts II and IV. The parties clearly contemplated that Mr. Thompson would only be liable for rape in the second degree, as evidenced by the fact that the trial court wrote "merged" on the judgment and sentence on those counts. The court's failure to enter a separate order vacating counts II and IV speaks to the enduring confusion caused by the Supreme Court's opinion in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007) (confusion the Supreme Court tried to correct in *State v. Turner*, 169 Wn.2d 448, 238 P.3d 461 (Aug. 2010)). (The Supreme Court acknowledged, in *State v. Turner*, supra, that *Womac* had, indeed, engendered confusion).

Rape in the second degree is the more serious offense, and the more serious offense is the offense that stands where conviction on two offenses would violate double jeopardy. See *Turner* at 465.

D. CONCLUSION

Mr. Thompson's convictions should be affirmed. His case should be remanded to the Superior Court so that his convictions for counts II and IV can be vacated and his judgment and sentence amended accordingly.

DATED this _____ day of _____, 2011.

Respectfully submitted:

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By: _____
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